

LAW OFFICES
WILLIAMS & CONNOLLY LLP

725 TWELFTH STREET, N.W.

JOSEPH M. TERRY
(202) 434-5320
jterry@wc.com

WASHINGTON, D. C. 20005-5901
(202) 434-5000
FAX (202) 434-5029

EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

July 22, 2020

Via ECF

Hon. Sarah Netburn
U.S. District Court for the Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: Rich v. Fox News Network, LLC, Case No. 18-cv-2223

Dear Judge Netburn:

I write on behalf of Fox News to address the discovery schedule in this matter, as the parties informed the Court we would do in our June 30 discovery status update. Based on the status of discovery to date, and the extent of the discovery that still must take place, as well as the continuing public health crisis, Defendants Fox News and Malia Zimmerman respectfully request a three-month extension of the discovery schedule.¹

At present, fact discovery is set to conclude by September 18, 2020, and expert discovery by December 31, 2020. Dkt. 110. No dates beyond expert discovery have been set. This existing schedule was set on February 12, 2020, a month before the country closed in response to the COVID-19 pandemic, and almost two months before the parties finalized their agreed-upon search terms on April 7, 2020. *See* Dkts. 135, 136. The parties have proceeded with reasonable diligence—despite counsel and clients alike working remotely for the past four months—but a number of factors will make it exceedingly difficult to complete fact discovery by the current September 18 cut-off. Extending the schedule by three months, particularly in these circumstances, is reasonable and will not cause material prejudice to any party. No date has been set for either the filing of dispositive motions or trial and thus an extension of the discovery schedule is unlikely to affect the final disposition date of this matter. Even so, a three-month extension of the time to verdict, particularly in a case seeking only monetary damages, does not

¹ Fox News is aware that Defendant Ed Butowsky has requested a four-and-a-half-month extension, Dkt. 164, to the schedule and does not oppose such a request, as it will allow the public health crisis to abate even further and dramatically increase the possibility for the in-person taking of depositions.

WILLIAMS & CONNOLLY LLP

July 22, 2020

Page 2

constitute prejudice. Indeed, concerns of prejudice militate in favor of this extension as it would: allow the parties sufficient time to complete depositions; increase the space for potential abatement—at least in the current spike—of the public health crisis; and give the Court sufficient time to address pending motions to dismiss that could eliminate one party entirely—Ed Butowsky—and eliminate the need for discovery on several claims against Fox News. In particular, an extension is warranted based upon the following facts.

1. None of the Parties Has Completed Document Production

Plaintiffs' production, though comparably quite small, has not been completed. Fox News cannot begin depositions until it has had time to fully review Plaintiffs' entire production. Among other things, Plaintiffs have yet to produce the medical or psychiatric records that Fox News requested eight months ago. Fox News expects that many of its depositions will be of the Riches' treating physicians and counselors, but that cannot fully be determined until those documents have been produced. Moreover, a review of those documents may reveal the need for additional third-party subpoenas.

Fox News has produced 16,628 documents to date and expects that completing its production will take another thirty days. The length of time for completing this production has been driven in large part by the expansive search terms requested by Plaintiffs and agreed to by Fox News. These search terms were not finalized until April 7, 2020, almost two months after the schedule was entered. These terms have resulted in time-consuming document review involving 28 custodians. Fox News's document review in this case is particularly time-intensive because many documents contain information that could identify a confidential source or are otherwise protected by a newsgathering privilege. As such, a particularly close review is required of all documents before they are produced. Moreover, the pandemic has required attorneys, clients, and document vendors alike to work entirely remotely—often while they simultaneously oversee Zoom classes for their children and other increased childcare commitments as well as navigate the numerous other complications arising from the public health crisis and the related restrictions.

Ms. Zimmerman has not completed her document production and requires approximately one more month to do so.

Mr. Butowsky, who was *pro se* until very recently, has yet to complete his document production as well. And as noted at the outset of this letter, Fox News does not oppose Mr. Butowsky's request for a four-and-a-half-month extension: it would allow the public health crisis to abate even further and dramatically increase the possibility for the in-person taking of depositions.

2. Numerous Third Parties Have Yet to Complete Document Production

Fox News subpoenaed Aaron Rich, the brother of Seth Rich and executor of his estate, on January 8, 2020, for a range of documents relating to, among other things: the damages claimed

WILLIAMS & CONNOLLY LLP

July 22, 2020

Page 3

by Joel and Mary Rich; his own communications with the press and the Riches' PR firm; and materials concerning any connections between Seth Rich and WikiLeaks. Because of discovery disputes, a several-month extension² of the discovery schedule in Aaron Rich's litigation in the D.D.C., and motion practice related to Malia Zimmerman's deposition in that case, Aaron Rich has not yet produced any documents. Fox News and Aaron Rich's counsel are presently negotiating the contours of that production. Fox News also awaits documents from Cassandra Fairbanks, who has repeatedly tweeted and written about a potential connection between Seth Rich and WikiLeaks.

Less than a month ago, Plaintiffs issued subpoenas to multiple additional third parties, including Sean Hannity, Greg Wilson, Ken LaCorte, Thomas McInerney, and John Moody. These documents remain to be produced and reviewed by all parties. In total, since discovery began, Plaintiffs have subpoenaed roughly a dozen individuals and entities in addition to their numerous document requests to Fox News. To the best of Fox News's knowledge, only two of the eleven third parties whom Plaintiffs have served have produced documents to Plaintiffs to date.

3. The Parties Intend to Notice Numerous Depositions

No depositions have been taken to date. Fox News understands from its conversations with Plaintiffs that they intend to notice roughly a dozen or more depositions. Fox News will likely notice another half dozen or more depositions, principally of members of the Rich family and their physicians and counselors, who might serve as damages witnesses, as well as their public relations consultant who dealt with media inquiries following Seth Rich's death and who just recently produced documents. Fox News has also submitted a letter motion in support of the issuance of a Letter of Request for the taking of the deposition of Mr. Julian Assange, who is currently incarcerated overseas. It is unclear how many depositions Mr. Butowsky intends to take.

That the parties will have to take potentially 20 or more depositions in a month's time, absent an extension of the schedule, is evidence enough that an extension is warranted. Even more so given current public health conditions. The current spike in COVID-19 cases throughout the country poses significant complications for both conducting and preparing witnesses for these depositions. As the President stated yesterday, the situation is likely going to "get worse before it gets better." See <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-press-briefing-072120/>. The current schedule would thus require parties to prepare for and take depositions, for witnesses principally located in New York and Los Angeles, in the teeth of the

² Two related litigations, *Aaron Rich v. Butowsky, et al.* (D.D.C 18-cv-00681) and *Butowsky v. Folkenflik, et al.* (E.D. Texas 18-cv-00442), saw their schedules extended by several months during this 2020 COVID-19 crisis. In the *Aaron Rich* matter, fact discovery was stayed for several months, and the close of expert discovery was moved by over eight months from March 2, 2020 to November 13, 2020. In the *Folkenflik* litigation, the close of discovery was moved from October 30, 2020 to January 15, 2021. This case is just as expansive, if not more expansive, than both of those matters, and a push of the discovery schedule is just as warranted.

WILLIAMS & CONNOLLY LLP

July 22, 2020

Page 4

pandemic.³ A three-month extension would push the close of fact discovery to December 18, 2020, and would provide more space for the general situation to get from “worse” to “better,” or simply better.⁴

Although depositions can be taken remotely, and witnesses can be prepared remotely, the effectiveness of both would be greatly enhanced by the ability to conduct them in person. Moreover, because the depositions of Fox journalists and editors will likely involve numerous issues of privilege, counsel for Fox News believes that it is particularly important that we be able to defend these depositions in person, to advise and confer on these issues as they arise. Because of the importance of this issue, Fox News requested, and the parties have agreed in principle, that even if depositions are to be taken remotely, parties and deponents may opt to have their counsel present in person to defend their deposition, subject to appropriate restrictions.

4. Outstanding Motions

An extension of the discovery schedule would bring the further benefit of allowing for potential resolution of the two pending motions to dismiss. Fox News has moved to dismiss the negligent supervision, vicarious liability, conspiracy, and aiding and abetting claims. Dismissal of one or more of those claims would streamline the topics on which Fox witnesses—including any Rule 30(b)(6) witness—would be deposed. Separately, Mr. Butowsky has a pending motion to dismiss for lack of personal jurisdiction. If he remains in the case as a defendant, Mr. Butowsky has indicated that he intends to subpoena a number of third parties not presently part of the case. *See* Dkt. 155, p.3. A grant of this motion to dismiss would thus have significant effect on the scope of third-party discovery.

5. An Extension of the Discovery Schedule Would Not Result in Prejudice

No party would experience prejudice from a three-month extension of the discovery schedule. No date has been set for the filing of dispositive motions or trial: the extension is thus unlikely to affect the final disposition date. Nor would a three-month extension of the final disposition date result in any prejudice. Plaintiffs do not seek injunctive relief, and considerations of all the parties favor an extension. All parties could have sufficient time to review all documents and conduct their depositions, the chances of improvement of the public health environment would

³ New York, for example, has imposed a quarantine on travel into New York by individuals from states subject to that spike. *See* New York Executive Order No. 205, available at <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO205.pdf>.

⁴ Though precautionary measures alone may significantly improve the public health environment, it is notable that Pfizer and BioNTech announced today that the U.S. government had placed an initial order of 100 million doses of a vaccine that Pfizer stated in a press release could be manufactured as early as the end of 2020. *See* <https://investors.pfizer.com/investor-news/press-release-details/2020/Pfizer-and-BioNTech-Announce-an-Agreement-with-U.S.-Government-for-up-to-600-Million-Doses-of-mRNA-based-Vaccine-Candidate-Against-SARS-CoV-2/default.aspx>.

WILLIAMS & CONNOLLY LLP

July 22, 2020

Page 5

increase, and the Court would have additional time to address the several pending motions to dismiss, which have the potential to decrease the scope of discovery significantly.

For these reasons, Fox News respectfully submits that the close of fact discovery be set to Friday, December 18, 2020, the close of expert discovery be set to Wednesday, March 31, 2021, and all intermediate deadlines set by the Court be similarly extended by three months.

Finally, the parties have met and conferred and agree that they will jointly create a deposition protocol to account for the necessary logistics of depositions taken during COVID-19. There are no issues to raise with the Court at this time as to such a protocol.

Respectfully submitted,

/s/ Joseph M. Terry
Joseph M. Terry
Counsel for Fox News Network, LLC

Cc: Counsel of Record